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No. 83-467

In The
Supreme Court of the United States
October Term, 1983

ROBERT PAULSON and CELESTE PAULSON, husband and wife; ERNEST POSICK and DONNA POSICK, husband and wife; GEORGE PARIS and THELMA PARIS, husband and wife; VELDON STARGEL and GLADYS STARGEL, husband and wife, and RITA HARRIS,

Appellants,

vs.

THE COUNTY OF PIERCE,

Appellee.

Appeal from the Supreme Court of the State of Washington

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether appellant complied with the Rules of the Supreme Court of the United States.

2. Whether Wash. Rev. Code § 86.12.037 creates an improper classification.

3. Whether Wash. Rev. Code § 86.12.037 is rationally related to a legitimate governmental purpose and therefore not violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

4. Whether a conflict exists regarding the constitutionality of Wash. Rev. Code § 86.12.037.

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Appellants,

vs.

THE COUNTY OF PIERCE,

Appellee.

Appeal from the Supreme Court of the State of Washington

MOTION TO DISMISS OR AFFIRM

Appellee Pierce County respectfully moves the Court pursuant to Rule 16 of the Rules of the Supreme Court to dismiss the appeal for failure to take this appeal in compliance with the rules of the Court and for want of a substantial federal question. In the alternative, appellee moves the Court to affirm the judgment of the Supreme Court of the State of Washington on the grounds that:

1. The decision of the Washington State Supreme Court, on the question presented, was carefully considered and is correct.

2. There is no conflict of decisions among the Courts of Kansas and Washington on this issue.

IDENTIFICATION OF PARTIES

Robert and Celeste Paulson, Ernest and Donna Posick, George and Thelma Paris, Veldon and Gladys Stargel, and Rita Harris, appellants, are property owners in Pierce County. The County of Pierce, appellee, is a Washington municipal corporation.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, included as an appendix to appellants' jurisdictional statement is reported at 99 Wash. 2d 645, 664 P. 2d 1202 (1983). The Court's Order Denying Motion for Reconsideration is not reported, but is also contained in the appendix to the jurisdictional statement.

JURISDICTION

Appellants assert that jurisdiction for their appeal to this Court is conferred by 28 U. S. C. § 1257 (2). This

appeal raises the question of the constitutionality of § 86.12.037 of the Revised Code of Washington, as fully set forth hereafter.

IMPLICATED CONSTITUTIONAL PROVISION

U. S. Const., Amend. XIV § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Wash. Rev. Code § 4.92.090.

> The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

Wash. Rev. Code § 4.96.010.

> All political subdivisions, municipal corporations, and quasi-municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents

or employees to the same extent as if they were a private person or corporation: *Provided,* That the filing within the time allowed by law of any claim required shall be a condition precedent to the maintaining of any action. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

Wash. Rev. Code § 86.12.037.

Liability of county or counties to others. No action shall be brought or maintained against any county alone or when acting jointly with any other county under any law, its or their agents, officers or employees, for any noncontractual acts or omissions of such county or counties, its or their agents, officers or employees, relating to the improvement, protection, regulation and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks and waters thereof: *Provided,* That nothing contained in this section shall apply to or affect any action now pending or begun prior to the passage of this section.

STATEMENT OF THE CASE

In 1961, appellee Pierce County constructed a dike on the Nisqually River. In subsequent years it enlarged and maintained the dike. Appellants are Pierce County residents who owned property behind the Nisqually River Dike. On December 2, 1977, a portion of the Nisqually River Dike was breached due to flooding, causing damage to appellants' property. Appellants commenced action against Pierce County.

At trial, Pierce County asserted that it was immune from prosecution under Wash. Rev. Code § 86.12.037. The trial court held that the legislature had overruled § 86.12.037 by implication. The jury subsequently found for appellants and against Pierce County. Pierce County appealed and the Washington Supreme Court reversed the trial court on grounds that, *inter alia*, § 86.12.037 was not impliedly overruled by Wash. Rev. Code §§ 4.92.090 and 4.96.010, and that it did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution even though it conferred immunity on counties but not other governmental bodies. Appellants are appealing that ruling.

ARGUMENT

I. Appellant Has Failed to Comply With the Rules of the Supreme Court.

Pursuant to Rule 16.1 (a) & (d), appellee asserts that the Court should dismiss this appeal because appellants have failed to comply with the Rules of the Supreme Court in the following respects:

1. The appellants have appended to their jurisdictional statement a faulty and irrelevant document entitled "Judgment on General Verdict With Answers to Interrogatories" in violation of Rule 15.1 (j) (i). A true and correct version of the trial court's Judgment on the Verdict is attached to this motion at Appendix A.

2. In violation of Rule 28.5, neither appellants' "Notice of Service of Notice of Appeal From the Supreme Court of the State of Washington" nor their "Certificate of Service of Jurisdictional Statement" either contains or is accompanied by a statement that all parties required to be served have been served.

II. Appellant Has Failed to Identify a Recognizable Class of Persons Subject to Disparate Treatment.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution announces a fundamental principle: The State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979). The Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others. *Jones v. Helms*, 452 U.S. 412, 423-24 (1980). Most frequently, claims of denial of equal protection of the laws are asserted by the members of a class of persons easily defined by a characteristic such as race, sex, alienage, illegitimacy, or religion. *Id.* at 424 n. 23.

Appellants have failed to show the existence of a recognizable class. Wash. Rev. Code § 86.12.037 applies equally to all residents of the State of Washington. Nothing in appellants' argument or in the record suggests that the statute has been enforced against them any differently than it would be against anyone else injured in the same manner. All persons, whether resident or not, injured by a county's flood control activities are prohibited from as-

serting claims against the county. All persons injured by another governmental body's flood control activities may maintain a suit against that body for such injury. Thus, appellants have not been subjected to disparate treatment.

The case of *Jones v. Helms, supra,* is analogous. There, the appellee challenged the validity of a Georgia statute which held parents who abandoned their children and left the state guilty of a felony while holding parents who abandoned their children but remained in the state guilty of a misdemeanor. The Court recognized that the statute applied equally to all parents. The Court stated:

> By its terms, [the statute] does not subject "one cast of persons to a code not applicable to another," . . . nor has appellee shown that it has been arbitrarily or discriminatorily applied. Thus, neither on the face of [the statute], nor in its application to appellee, can we detect any violation of the constitutional requirement that the State's administration of its own laws must be impartial and evenhanded.

Id. at 424 (Citations omitted). *Accord New York City Transit Authority v. Beazer, supra,* at 587-88.

III. Section 86.12.037 of the Revised Code of Washington is Rationally Related to a Legitimate Governmental Objective.

Assuming an improper statutory distinction exists, that distinction does not violate the Equal Protection Clause of the Fourteenth Amendment.

Appellants have not suggested, nor could they suggest, that the operation of Wash. Rev. Code § 86.12.037 burdens a suspect class. The classification they allege does not implicate race, nationality, or alienage. *See Graham v.*

Richardson, 403 U. S. 365, 371-72 (1971). Nor does the statute impinge upon a fundamental right. Appellants have no vested right in any common law action against a state or municipality. *Second Employers' Liability Cases*, 223 U. S. 1, 50 (1912). There is also no constitutional right to sue the government. *Parden v. Terminal Railway*, 377 U. S. 184, 186 (1963). Moreover, access to the courts is not an independent right; it is accorded special protection only when the right a claimant wishes to assert is protected. *Woods v. Holy Cross Hospital*, 591 F. 2d 1164, 1173 n. 16 (5th Cir. 1979).

Without the involvement of a suspect class or a fundamental right, courts are reluctant to overturn governmental action on the ground that it denies equal protection of the laws. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, [the Court] will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U. S. 93, 97 (1979) (footnote omitted).

In determining whether a challenged classification is rationally related to the achievement of a legitimate state purpose, the Court must affirmatively answer two questions: (1) Does the challenged legislation have a legitimate purpose? (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose? *Western & Southern Life Insurance*

Co. v. State Board of Equalization, 451 U. S. 648, 668 (1981). In answering this latter question, it is unnecessary to find that in fact the statute will accomplish its objectives. Rather, the Equal Protection Clause is satisfied if the legislature rationally could have believed that the statute would promote its objective. *Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456, 466 (1981) . The question need only be debatable. *See United States v. Carolene Products Co.*, 304 U. S. 144, 154 (1938). The parties challenging the legislative judgment bear the burden of convincing the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. *Vance v. Bradley, supra*, at 111.

With respect to the Washington statutes involved here, appellants' equal protection claim thus depends upon whether a state may single out persons injured by a county's flood control activities. In making this inquiry, the state is "presumed to have acted within [its] constitutional powers despite the fact that, in practice, [its] laws result in some inequality." *McGowan v. Maryland*, 366 U. S. 420, 425-26 (1961).

The state's purpose in freeing counties from liability for flood control activities, but not other governmental bodies, is legitimate. Washington receives a substantial amount of rainfall annually. The steep gradient of the Cascade mountains, the high velocity of the rivers flowing from it, combining with the substantial amounts of rain and snowfall present grave risk of human and property loss by flooding if left unchecked. Measures intended to prevent such loss protect the public health and safety and

therefore are legitimate exercises of the state's police power. The Washington Supreme Court has repeatedly found that the legislature intended the immunity provision in § 86.12.037 to encourage counties to undertake flood control measures. *Paulson v. County of Pierce*, 99 Wash. 2d at 654; *Short v. Pierce County*, 194 Wash. 421, 430-31, 78 P. 2d 610 (1938). Therefore, the legislature's enactment of § 86.12.037 was legitimate.

Moreover, the legislature could reasonably believe that, by granting immunity for flood control activities, it would encourage those immunized to undertake such activities. The courts often have recognized that where a duty to undertake an activity does not exist, or where it would be unfair to impose such a duty as a matter of law, the activity may be encouraged by granting immunity to those being sought to conduct those activities. *See, e. g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U. S. 59 (1977) (limiting liability to nuclear energy producers); *Silver v. Silver*, 280 U. S. 117 (1929) (sustaining guest/host doctrine); *Jones v. Wyeth Laboratories, Inc.*, 457 F. Supp. 35 (W. D. Ark.) (immunizing swine flu vaccine producers), *aff'd*, 583 F. 2d 1070 (8th Cir. 1978). Moreover, immunity may also protect the political body's financial reserves thereby freeing a greater portion of its finances for devotion to the desired activities. *See Daughtry v. Arlington County*, 490 F. Supp. 307 (D. C. D. C. 1980). Thus, by granting immunity to counties the legislature reasonably could have believed that it would be encouraging effective flood control activities.

That some, but not all, of those empowered to undertake flood control measures are immune from liability is of no moment. The courts have frequently recognized that

either the nature of the one immunized, or a desire for a particular body to carry out a particular activity, may necessitate granting immunity to a class conducting activities identical to those of a nonimmune class. *See, e. g., Harris v. Pennsylvania Turnpike Commission*, 410 F. 2d 1332 (3rd Cir. 1969) (Commission liable for trespass but not negligence in constructing turnpike), *cert. denied*, 396 U. S. 1005 (1970); *Obenshain v. Halliday*, 504 F. Supp. 946 (E. D. Va. 1980) (county officials immune from proprietary acts while municipalities are not); *Meyerhoffer v. East Hanover Township School District*, 280 F. Supp. 81 (M. D. Pa. 1968) (school district immune from liability for bussing activities while private parties are not). It is rational for the legislature to have desired that counties alone assume primary responsibility for flood control activities. Granting counties immunity for those activities while not granting it to other governmental bodies is a logical means of assuring that counties will assume that primary role. Thus, that the legislature only granted immunity for a county's flood control activities does not alter the fact that Wash. Rev. Code § 86.12.037 is rationally related to a legitimate government purpose and is therefore not violative of the Fourteenth Amendment's Equal Protection Clause.

IV. There is No Conflict on This Issue Among the States.

In support of their appeal, appellants urge that a conflict exists on this issue among the highest courts of the states of Washington and Kansas. To support that argument, appellants cite the decision of *Flax v. Kansas Turnpike Authority*, 226 Kan. 1, 296 P. 2d 446 (1979). In *Flax*,

the wife of a driver killed on the Kansas Turnpike sued the Turnpike Authority for her husband's death. The Authority claimed immunity under a Kansas statute. All other governmental units were liable for negligent road design. The Kansas Supreme Court held the immunity statute unconstitutional on the grounds that:

> The [statute's] ultimate effect . . . is to create a small class of motorists who are subjected to discrimination for no other reason than they happened to take the turnpike and as a result, are deprived of a remedy granted the motorist on every other road in Kansas.

Id., 596 P. 2d at 453.

Flax is readily distinguished from the case at bar. First, *Flax* was held unconstitutional under the Constitutions of the State of Kansas and the United States. *Id.*, 596 P. 2d at 450. Thus, it does not present a conclusive example of a conflict in interpretations of the Federal Constitution because the holding rested on independent state grounds.

Second, the Turnpike Authority apparently had responsibility only for a single roadway, the Kansas Turnpike. *See Hendrix v. City of Topeka*, 231 Kan. 113, 643 P. 2d 129, 133 (1982). By contrast, the counties covered under Washington's immunity statute have responsibility for numerous and extensive flood control projects. The greater burden justifies the immunity. *See Aubertin v. Board of County Commissioners*, 588 F. 2d 781 (10th Cir. 1978).

Third, the Kansas Supreme Court subsequently noted that *Flax's* distinguishing feature was that some motorists had rights denied others. *Hendrix v. City of Topeka, su-*

pra. Where the statute affected all to an equal degree, the court upheld the immunity. *Id.* Here, § 86.12.037 confers immunity on all counties throughout the state. Every Washington citizen resides in a county. Thus, the statute affects every Washington citizen to an equal degree.

Finally, *Flax* involved immunity for road construction and maintenance, not flood control activities. The distinction is important because the burdens the governmental entity assumes are different. Roadways are easily inspected and repairs frequently are minor. Maintaining flood control projects, however, requires substantial undertakings; dredging rivers involves more work, greater cost, and higher risk than filling potholes. Additionally, roads are built as much to benefit public convenience as to protect public health and safety. Flood control projects are undertaken almost exclusively to protect public health and safety. Given these distinguishing features, courts understandably give less solicitude to a provision granting immunity to the entity constructing a state's most modern thoroughfare than to an entity constructing a flood control project. For these reasons, *Flax* is not in conflict with the ruling of the Washington Supreme Court in this case.

CONCLUSION

Appellants assert this appeal alleging that Wash. Rev. Code § 86.12.037 violates the Fourteenth Amendment to the United States Constitution because it renders counties immune for flood control activities while allowing other governmental bodies to be held liable for similar actions.

Appellants have failed to show that the statute burdens them unevenly, or that the statute is unrelated to a legitimate governmental purpose. Because appellants have failed to take this appeal in conformance with the Rules of the Supreme Court, because § 86.12.037 applies equally to all Washington residents, and because the statute reasonably furthers the legitimate governmental purpose of encouraging counties to undertake flood control activities, appellee respectfully requests this Court to dismiss appellants' appeal or, in the alternative, to affirm the Washington Supreme Court's holding in this case.

DATED this 11th day of October, 1983.

Respectfully submitted,

BURGESS, KENNEDY & FITZER, P.S.

By: KAREN L. STROMBOM

Attorney for Appellee

APPENDIX A

No. 267086

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

ROBERT PAULSON and CELESTE PAULSON, husband and wife; ERNEST POSICK and DONNA POSICK, husband and wife; GEORGE PARIS and THELMA PARIS, husband and wife; VELDON STARGEL and GLADYS STARGEL, husband and wife, and RITA HARRIS,

Plaintiffs,

vs.

THE COUNTY OF PIERCE,

Defendant.

JUDGMENT ON THE VERDICT

THE ABOVE ENTITLED MATTER having come on duly and regularly for trial on the issue of damages before the undersigned judge, sitting with a jury; the parties appearing in person or through their representatives and being represented by their respective attorneys; the jury having been sworn to try the case; evidence having been adduced on behalf of the various parties; the jury having thereafter been duly instructed on the law, after which the jury deliberated upon its verdict and found in favor of the plaintiffs in various amounts; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiffs PAULSON have judgment against the defend-

ant in the sum of Eight Thousand One Hundred Ninety and no/100—($8,190.00)—Dollars, plus said plaintiffs' taxable costs herein; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs POSICK have judgment against the defendant in the sum of Thirty Five Thousand One Hundred Sixty Eight and no/100—($35,168.00)—Dollars, plus said plaintiffs' taxable costs herein; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs PARIS have judgment against the defendant in the sum of Fifty Two Thousand Three Hundred Fifty Five and no/100—($52,355.00)—Dollars, plus said plaintiffs' taxable costs herein; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs STARGEL have judgment against the defendant in the sum of Fourteen Thousand Six Hundred Fifty Five and no/100—($14,655.00)—Dollars, plus said plaintiffs' taxable costs herein; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff HARRIS have judgment against the defendant in the sum of Thirty Thousand One Hundred Eighty Six and no/100—($30,186.00)—Dollars, plus said plaintiff's taxable costs herein.

DONE IN OPEN COURT this 17th day of October, 1980.

/s/ Donald H. Thompson
JUDGE

Presented By:

/s/ F. Ross Burgess
F. ROSS BURGESS
Attorney for Defendant